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IN THE

Supreme Court of the United States

October Term, 1957

No. 634

A. MASCHMEIJER, JR. INC.,
Petitioner,

against

EASTERN MOTOR EXPRESS, INC.,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Respondent respectfully submits that the petition fails to present any question for determination by this Honorable Court.[1] Petitioner's disregard of Rule 23 of the Revised Rules and the petition's plain lack of merit recommends denial of certiorari.

If the case presents any question (though one hardly meriting review) it is this:

> Does a shipper who delivers packaged goods for shipment warrant that the container, if not patently inadequate, is fit for the contemplated shipment so that the shipper is liable for damages which arise by reason of the violation of the warranty, and does the "packing rule" contained in the carrier's tariff recognize this principle of common law?

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[1] The duplicative motions for leave to file briefs *amicus curiae* serve only to becloud what is already obscure in the petition.

Statute Involved

Petitioner suggests that the decision by the Court of Appeals involves a novel and unorthodox construction of Section 20(11) of the Interstate Commerce Act (49 U. S. C. A. § 20(11)).[2] Section 20(11) of the Interstate Commerce Act (herein called the "Act") is not involved at all. Its impact, if any, is only tangential.

Contrary to Petitioner's contention, the decision of the Court below does not sanction a limitation of liability in contravention of Section 20(11) of the Act (Petition, at pp. 6-7, 27, 31, 32). There is no question of limitation of liability in this case. This is made evident by the text of the opinion by the Court below (Petition, Appendix at pp. 34 to 40).

The Packing Rule

The Packing Rule [Rule 5, subsection 8(a), of Tariff MF-ICC No. 17, National Motor Freight Classification No. 9] provides in pertinent part:

> "Barrels * * * drums * * * must be made of wood * * * metal * * * or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods."

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[2] Section 20(11) is made applicable to motor common carriers by the provisions of Section 219 of the Interstate Commerce Act, Part II (49 U. S. C. A. § 319).

ARGUMENT

The decision by the Court of Appeals for the Second Circuit does not constitute a first or novel construction of Section 20(11) of the Interstate Commerce Act; it does not suggest any of the criteria established by Rule 19 of the Revised Rules of this Court; the issues involved do not have that stamp of importance which warrant the exercise of certiorari jurisdiction by this Court.

The damage and loss in this case were attributable to the act and default of the petitioner-shipper (Petition, Appendix, pp. 38, 40). The facts show that the petitioner shipped a liquid chemical in containers which were inherently defective; the latent defect was not observable by the carrier-respondent and the petitioner thereby violated the implied warranty of fitness for the contemplated shipment, recognized by the tariff "packing rule" (Petition, Appendix, pp. 37-38).

Petitioner misreads and, consequently, misunderstands the decision by the Court of Appeals in this case (Petition, Appendix, pp. 34 to 40). Petitioner also misconceives the nature of the case. This action does not turn on a defense by the respondent that its liability was limited. On the contrary, suit was instituted by the respondent-carrier to recover damages sustained because of the petitioner's breach of contract. The Court below pointed out that, at common law, a shipper who delivered packaged goods for shipment "impliedly warrants that the containers, if not patently inadequate, are fit for the contemplated shipment" (Petition, Appendix, at p. 37). The "packing rule" plainly describes the kind and quality of containers which will be accepted. In effect, therefore, the "packing rule" is a recognition of the common law principle that a carrier is under obligation to accept for shipment containers which "are not patently unfit" for shipment *i.e.*, meet the require-

ments of the "packing rule." However, where a carrier receives for shipment containers which are inherently defective or where the defect is latent and not observable by the carrier, the damage which results, by reason of the latent defect, renders the shipper liable for a breach of the implied warranty of fitness "for the contemplated shipment" (Petition, Appendix at p. 37).

Petitioner is in error, too, in assuming that Section 20(11) precludes suit by a carrier against a shipper—the very case at bar.[3]

The rights and liabilities of the parties were governed by the contract of carriage, namely, the bill of lading and the published tariff. A tariff provision (such as the "packing rule") is binding upon the carrier and shipper alike. *Chesapeake & Ohio Railway Company* v. *Martin & Porter*, 283 U. S. 209 (1931); *Davis* v. *Henderson*, 266 U. S. 92 (1924); *Louisville & Nashville R. Co.* v. *Chatters*, 279 U. S. 320, 331 (1929); *American Ry. Express Co.* v. *American Trust Co.*, 47 F. 2d 16 (C. A. 7, 1931), cert. den. 284 U. S. 629; *Boone* v. *United States*, 109 F. 2d 560, 562 (C. A. 6, 1940).

Contract law, and not principles of negligence, is the touchstone of the decision by the Court below. The contract of carriage fixed the liabilities of the parties. The

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[3] Section 20(11) does not enact a rule of absolute liability or impose upon a carrier the obligation of an insurer. It is elementary that a common carrier, subject to the provisions of the Act is responsible for loss or damage caused by it; it is not responsible for loss or damage caused by an Act of God, the public enemy, the inherent nature of the goods or the act or default of the shipper. *Adams Express Company* v. *Croninger*, 226 U. S. 491 (1913); *Chesapeake & Ohio Railway Company* v. *A. E. Thompson Manufacturing Company*, 270 U. S. 416 (1926); *Blytheville Cotton Oil Co.* v. *Kurn et al.*, 155 F. 2d 467 (C. A. 6, 1946); *Alabama & V. Ry. Co. et al.*, v. *American Cotton Oil Co.*, 249 Fed. 308 (C. A. 5, 1918); *Crump et al.* v. *Thompson*, 171 F. 2d 442 (C. A. 8, 1948); *Austin* v. *Seaboard Air Line R. Co.*, 188 F. 2d 239 (C. A. 5, 1951); *Modern Tool Corp.* v. *Pennsylvania R. Co.*, 100 F. Supp. 595 (D. C. N. J., 1951)

"packing rule" was a reaffirmation of the carrier's duty to accept containers not patently unfit for shipment. When, as in the case at bar, damage or loss results because of a latent defect in the containers, the shipper is liable for a breach of an implied warranty of fitness and the liability "as bailor-warrantor is absolute" (Petition, Appendix, pp. 37-38).

The negligence concept of "due care", urged by petitioner (Petition, p. 17) "is irrelevant" (Petition, Appendix, pp. 37-38). Parenthetically, it may be noted that petitioner concedes that respondent proved that it had exercised due care in the handling of the drums (Petition, p. 30) and the Trial Court refused to find that respondent was guilty of contributory negligence (Petition, Appendix, p. 38).

Enchanted by a misplaced concept of negligence, petitioner steadfastly refuses or fails to recognize that the issue of negligence was not involved at all. This explains petitioner's incorrect contention that the decision in this case is in conflict with *Commodity Credit Corporation* v. *Norton*, 167 F. 2d 161 (C. A. 3, 1948).[4] In that case, it was claimed that the loss arose because the goods had been packed in allegedly defective barrels. The District Court had, in effect, instructed the jury that if the carrier had handled the goods properly ("ordinary, acceptable handling") then it was not liable. The Court of Appeals for the Third Circuit reversed, holding that "due care" became a material fact only if the jury, in the first instance, finds the existence of a latent defect or an excepted peril.

In the instant case, both the District Court and the Court of Appeals found that the damage or loss was caused by the latent defect of the drums in which the petitioner shipped the liquid chemical. Both courts expressly found that no acts of the respondent in the handling of the ship-

[4] Petitioner cites the decision at "161 F. 2d 161" (Petition, p. 2).

ment constituted contributory negligence which occasioned the damage.

Moreover, *Commodity Credit Corporation* v. *Norton*, *supra*, did not involve a claimed breach of a tariff rule or warranty. Hence, negligence was the key to that decision. In the case at bar, negligence "is not material on the issue of liability on the claim of a breach of implied warranty" (Petition, Appendix, pp. 37-38). In short, the decision by the Court of Appeals, in this case, disposes of a simple contract question, namely, the proven breach by the petitioner of an implied warranty of fitness.

Conclusion

The petition fails to suggest even the substance of a question calling for decision by this Honorable Court. There is no conflict of decisions to be settled and no important issue of statutory construction which requires resolution by this Honorable Court.

The petitioner's case is grounded on two illusory propositions: a statute which has only incidental pertinency to the issues involved and a conception of liability which finds no support in the statutory or decisional law.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated, New York, January 31, 1958